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January 14, 2004

Hon. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals II
445 12 Street, SW
Washington, D.C. 20554

Re: Comments of the New York State Department of Public
Service in the Matter of Federal-State Joint Board On
Universal Service CC Docket No. 96-45.

Dear Secretary Dortch:

For filing, attached please find the Comments of the New York State Department of Public Service in the above-referenced matter in response to the Federal Communications Commission's Order on Remand, Further Notice of Proposed Rulemaking (FNPRM), and Memorandum Opinion and Order released October 27, 2003 and published in the Federal Register on December 14, 2003.

Sincerely,

Kathleen H. Burgess
Assistant Counsel

Attachment

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of
Federal-State Joint Board
On Universal Service

) CC Docket No. 96-45
)
)

**COMMENTS OF THE NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE**

The New York State Department of Public Service (NYDPS) submits these comments in response to the Federal Communications Commission's (Commission) Order on Remand, Further Notice of Proposed Rulemaking (FNPRM), and Memorandum Opinion and Order released October 27, 2003 and published in the Federal Register on December 14, 2003.¹ Here, the Commission modified its high-cost universal service support mechanism for non-rural carriers in response to the remand by the United States Court of Appeals for the Tenth Circuit of the Commission's Ninth Report and Order.² Generally adopting the recommendations of the Federal-State Joint Board on Universal Service, the Commission retained the existing non-rural high

¹ FCC 03-249, In the Matter of the Federal-State Joint Board on Universal Service, Order on Remand, Further Notice of Proposed Rulemaking and Memorandum Opinion and Order, released October 27, 2003.

² Qwest Corporation v. FCC, 258 F. 3d 1191 (10th Cir. 2001) (Qwest).

cost mechanism with minor modification, expanded the states' certification requirements, and added a process by which states may seek additional federal support. In the FNPRM, the Commission seeks comment on specific aspects of that supplemental support mechanism and states' reporting obligations.³

In addition, the Commission seeks comment on its new proposal to create a further supplemental support mechanism designed to induce states to establish explicit intrastate universal service funds.⁴ The Commission states that the purpose of this program is to "create a positive incentive for states to reform their implicit universal support mechanisms."⁵ As explained more fully below, the NYDPS opposes establishment of this mechanism because such an inducement would not be consistent with the Telecommunications Act of 1996 (the Act), is not required by the Tenth Circuit's remand, and would be an inappropriate interference in intrastate ratemaking.

³ See Comments of New York State Department of Public Service in the Matter of the Recommended Decision of the Federal-State Joint Board on Universal Service, released on October 16, 2002, addressing issues from the Tenth Circuit Remand; CC Docket No. 96-45, dated December 20, 2002.

⁴ When rates for some services are set above their costs, they are said to provide implicit support to services whose rates are below cost. When this above-cost portion of a rate is identified and collected separately, the support to the below-cost service is said to be explicit.

⁵ FNPRM, para. 126.

First, as the Commission itself has observed, nothing in the Act requires states to establish explicit universal service mechanisms or to remove any implicit support from intrastate rates, should it exist.⁶ Indeed, although the Act mandates explicit federal support,⁷ it expressly reserves to the states the right to determine the manner in which intrastate universal service programs will be funded.⁸ Nothing in the Act requires or expressly authorizes the Commission to impose its universal service support preference on states or to induce them to adopt that preference.

Second, this newly proposed supplemental support mechanism is not required by the Tenth Circuit's decision. The Court clearly required the Commission to establish an inducement to address the rate comparability requirements it found in the Act.⁹ However, the Court did not require the Commission to induce

⁶ FNPRM, para. 127.

⁷ 47 USC §254(e), "Any such (federal) support should be explicit..."

⁸ 47 USC §254(f), "Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State."

⁹ "The FCC's fundamental error is in concerning itself only with 'enabl[ing] reasonable comparability among states....' On remand, the FCC is required to develop mechanisms to induce adequate state action." Qwest at 1204.

states to establish explicit intrastate universal service mechanisms. The Court observed:

Although § 254(e) requires federal support to be explicit and § 254(k) prevents carriers from using non-competitive services to provide implicit subsidies for competitive services, we see nothing in § 254 requiring the FCC broadly to replace implicit support previously provided by the states with explicit federal support.¹⁰

Hence, the Tenth Circuit's decision does not provide a basis for this proposal, which, in effect, could replace implicit intrastate support with explicit interstate support.

Finally, the establishment of this support mechanism would be an inappropriate interference in intrastate ratemaking. The Commission asks whether it has an interest "in states' decisions to adopt explicit mechanisms or to rely on implicit support flows."¹¹ For the most part, intrastate rate designs have no impact on the Commission's interests in interstate telecommunications. To the limited extent that intrastate ratemaking might affect the Commission's interests in the advancement of universal service, states have these same interests and, under state and federal law, have even greater obligations to ensure the availability of safe, adequate, and

¹⁰ Qwest at pages 1203-1204.

¹¹ FNPRM para. 127

affordable telecommunications services within their borders.
States have adequate incentives to establish explicit support
mechanisms if and when they are deemed necessary.

CONCLUSION

For the above reasons, NYDPS urges the Commission not to
adopt its proposed supplemental support mechanism to induce
states to establish explicit universal service mechanisms.

Respectfully submitted,

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Dated: January 14, 2004

